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No. 88-368

In The

Supreme Court of the United States

October Term, 1988

THOMAS G. KOCH,

Petitioner,

vs.

THE CITY OF HUTCHINSON, KANSAS, et al.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Court of Appeals err in concluding that petitioner's "speech" was unprotected under the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968)?

   (A) Should the Court of Appeals have avoided *Pickering* balancing altogether, on the theory that respondents waived the issue by not citing *Pickering* to the trial court until their motion for judgment notwithstanding the verdict?

   (B) Should the Court of Appeals have avoided *Pickering* balancing altogether, on the theory that respondents ought not have been allowed to invoke *Pickering* unless they admitted at trial that petitioner's "speech" was a substantial or motivating factor in petitioner's demotion?

   (C) Did the Court of Appeals err in striking the *Pickering* balance in respondents' favor by (i) misreading the facts, or reading them inconsistently with the jury verdict; (ii) giving conclusive weight, or excessive weight, to the fact that petitioner's "speech" was made in an internal report that it was petitioner's job to make; or (iii) evaluating petitioner's "speech" in factual context rather than determining whether that "speech" was inherently disruptive in the abstract?

2. Did the Court of Appeals err in concluding that petitioner's "speech" was not on a matter of public concern within the meaning of *Connick v. Myers*, 461 U.S. 138 (1983)?

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RESPONDENTS' BRIEF IN OPPOSITION

Respondents[1] respectfully request that this Court deny the petition for writ of certiorari, which seeks review of the en banc opinion of the Court of Appeals for

1. Respondents are the City of Hutchinson, Kansas; Joan Schrag, Mayor; Bill Bornholdt, Ralph Gingrich, John Corey, and Dan Robinson, City Commissioners; George Pyle, City Manager; and Dallas Jones, Fire Chief. Only the City has an interest in the questions presented in the petition; petitioner's claims against the other respondents were disposed of below for reasons not disputed in the petition.

the Tenth Circuit, reported at 847 F.2d 1436 (1988) (the Court of Appeals' earlier decisions in the case are reported at 847 F.2d 1435 (1987) and at 814 F.2d 1489 (1987)).

STATEMENT OF THE CASE[2]

This lawsuit arose from mid-1979 events that culminated in petitioner's demotion from Fire Marshal to Fire Inspector for respondent City of Hutchinson. The events leading to the demotion began with a written report prepared by petitioner in the ordinary course of his job and submitted to Reno County Attorney Joseph O'Sullivan. Petitioner's report concluded that a house fire, in which an unattended small child burned to death, was the result of arson. The ultimate issue presented by the petition for certiorari is whether petitioner's report was protected by the First Amendment so that it could not lawfully be a basis for his demotion.

The decision to demote petitioner, which the jury in this case expressly found to be "reasonable" and in subjective[3] "good faith," was made by Respondents Dallas

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2. Unless other citations are given, all facts set out in this brief appear, with specific citation to the record on appeal, in the Court of Appeals' factual summary, 847 F.2d at 1437-39.

3. In the instructions to the jury, "good faith" was defined, entirely in subjective terms, as requiring belief in the propriety of one's actions, the absence of malicious intent, and the absence of knowledge that one's actions constitute a constitutional wrong. *See* Instruction No. 16, Appeal Appendix Vol. I, p. 196.

Jones, the City Fire Chief, and George Pyle, the City Manager. Their decision, which relieved petitioner of any official contact with the County Attorney (a non-party who had no role in the City's governance but was, rather, an elected official of the State of Kansas)[4] followed a letter of complaint about petitioner from the County Attorney. In the letter, the County Attorney accused petitioner of deliberately falsifying the fire investigation report, and concluded:

> The net result is a total lack of confidence in [petitioner's] opinion and in his ability to rationally and professionally conduct an investigation. This lack of confidence is not only on my part but is shared with me by the police detectives and the local K[ansas] B[ureau of] I[nvestigation] agent. On the other hand and to the contrary we have total confidence in the other arson investigators in your department, and that not only are they pleasant and cooperative to work with but their conclusions appear based in fact and reason. On behalf of the Reno County Attorney's Office and as long as I hold this position, I will not accept a report from [petitioner] as the basis of a criminal charge nor do I feel that I could ever call him as a State's witness and sponsor him as credible and reliable.

Petitioner and two of his subordinate fire inspectors began their investigation of the fatal house fire on May 11, 1979. All three investigators initially opined that the fire was an accident. Roughly a week later, however, petitioner heard that since the relevant statute had been declared unconstitutional, the County Attorney would

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4. *See* Kan. Stat. Ann. §§ 19-701 to -704. The bulk of a County Attorney's job involves criminal prosecutions in Kansas state district courts. *See id.* § 19-703.

not charge the dead child's parents with criminal endangerment, and that only if arson were involved might the parents be brought to task. Another week later, in petitioner's written report to the County Attorney, he concluded that the fire had been caused by arson. Petitioner's report does not mention that a laboratory report had suggested a cracked gas valve as a possible source of the fire, that an electrical inspector had found the house to have oversized fuses and poor wiring, or that petitioner's two subordinates adhered to their initial conclusion that the fire was accidental. Nonetheless, petitioner, in advancing his arson conclusion, purported to have eliminated all possible accidental causes of the fire.

County Attorney O'Sullivan testified that he was suspicious of petitioner's report because he had heard that the other two fire investigators still believed that the fire was accidental, and because he "felt that [petitioner] had changed his mind regarding the cause of the fire after he found out the parents couldn't be charged with endangering a child," although notwithstanding his suspicions he released petitioner's report and its conclusion to the press. *See* 814 F.2d at 1492. The other two fire investigators testified that they shared the County Attorney's suspicions of petitioner's changed opinion about the fire's cause. The County Attorney also recruited a Kansas Bureau of Investigation agent to investigate the fire. That agent reported to the County Attorney that there was no basis for concluding that the fire had been deliberately set. He also reported that he had received little cooperation from petitioner, who deeply resented that his conclusion was not being taken as gospel and that credence was

being given to the contrary conclusions of his subordinates.

On May 30, 1979, County Attorney O'Sullivan, the K.B.I. agent, petitioner, Fire Chief Jones, and a police detective met to discuss the situation, and open hostility was evident between petitioner and the County Attorney; petitioner was belligerent and uncooperative, according to everyone else at the meeting.[5] A few days later, the local newspaper published a story based on the information earlier given them by the County Attorney. *See* 814 F.2d at 1492.

Shortly thereafter County Attorney O'Sullivan learned about the laboratory tests which suggested a defective gas valve as a possible source of the fire, but which petitioner had omitted from his report. He requested a police investigation into petitioner's conduct. The investigating policeman received little cooperation from petitioner, who was upset and irate during their interview: petitioner told the detective that he did not have to explain or defend his report to anyone. After receiving the detective's report, the County Attorney sent the letter to Chief Jones in which he accused petitioner of deliberately falsifying his report and vowed never to accept a report from petitioner nor to sponsor petitioner as a witness.

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5. The Court of Appeals panel whose ruling in petitioner's favor was overturned en banc declared that there was a "raging hostility" between O'Sullivan and petitioner. 814 F.2d at 1492.

After receiving the letter from the County Attorney, Fire Chief Jones met with City Manager Pyle in mid-July, 1979, to discuss the accusations against petitioner. They decided to put petitioner on paid leave of absence until the matter could be investigated; Chief Jones then conducted an inquiry, including an extensive discussion with petitioner about petitioner's view of events. *See* Appeal Appendix, Vol. II, pp. 540-566 (transcript of taped discussion between Fire Chief Jones and petitioner). When the investigation was completed, the Fire Chief and City Manager decided to demote petitioner to a Fire Inspector position that would not involve participation in fire investigations.

Fire Chief Jones announced the demotion to petitioner in a July 23, 1979, letter that lists six reasons for the demotion: (1) petitioner's uncooperative and belligerent behavior toward other agencies investigating the fire; (2) petitioner's failure to make important information available to the other investigators; (3) the destruction of necessary working relationships caused by petitioner's behavior; (4) petitioner's failure to comply with Chief Jones's order to stay away from the subordinate Fire Inspectors until they had finished writing their reports for the County Attorney; (5) petitioner's deliberate refusal to cooperate with the County Attorney, despite repeated direction from Chief Jones that he cooperate; and (6) unspecified "unacceptable behavior you have demonstrated in the past." *See* Appeal Appendix, Vol. II, pp. 538-39. The jury's finding, by special verdict, that Fire Chief Jones and City Manager Pyle acted reasonably and in subjective good faith forecloses the possibility that the jury's verdict was based on the view that the Fire Chief or

City Manager believed the reasons given in Chief Jones's letter to be false.

After petitioner's demotion, local newspaper stories chronicled the demotion and preceding events, and petitioner contested the demotion in a state court mandamus action, which included a due process claim. Petitioner lost the state court action, and lost again on appeal. In the meantime, he had filed the present case against respondents in the United States District Court for the District of Kansas, alleging that his demotion violated his First, Fifth, Ninth, and Fourteenth Amendment rights and 42 U.S.C. §§ 1983, 1985, 1986 and 1988. In pretrial rulings and in a partial directed verdict at the close of petitioner's evidence, the District Court disposed of all petitioner's claims except his First Amendment claims against the City, Fire Chief Jones, and City Manager Pyle. These decisions were affirmed by the Court of Appeals, 814 F.2d 1489 (1987), were not reheard en banc, and are not questioned in the petition for certiorari.

In their trial brief filed in the District Court, respondents argued that petitioner's "speech" was unprotected under the "public concern" test of *Connick v. Myers*, 461 U.S. 138 (1982), and also under the "balancing test" of *Pickering v. Board of Education*, 391 U.S. 563 (1968). *See* Trial Brief of Defendants, District Court Docket No. 68, filed August 10, 1979, at pp. 9-18. Respondents accordingly moved at the close of petitioner's evidence, and again at the close of all the evidence, for a directed verdict on petitioner's First Amendment claims. The District Court denied respondents' First Amendment directed verdict motion, however, and instead instructed the jury that petitioner's written conclusion that the fire

was caused by arson was protected speech as a matter of law. The District Court also instructed, in accord with *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977), that the City should be held liable if petitioner's protected "speech" was a "substantial" or "motivating" factor in his demotion, unless respondents proved they would have demoted him even had the protected "speech" never been made. Faced with those instructions, the jury found the City liable to petitioner on his First Amendment claims, but it found in favor of the City Manager and Fire Chief and, as mentioned above, found that the City Manager and Fire Chief had acted reasonably and in subjective good faith in demoting petitioner.

The City then timely moved for judgment notwithstanding the verdict, again arguing, *inter alia*, that petitioner's speech was unprotected under the First Amendment because it was not on a matter of "public concern" under *Connick* and because it failed the balancing test of *Pickering*. The District Court granted the City's motion, relying on *Connick* and on *Schmidt v. Fremont County School District No. 25*, 558 F.2d 982 (10th Cir. 1977).

On appeal, a divided panel of the Tenth Circuit Court of Appeals reversed the judgment n.o.v. and reinstated the jury verdict, but affirmed the District Court's other rulings. 814 F.2d 1489 (10th Cir. 1987). The panel majority held that petitioner's speech did relate to a matter of public concern under *Connick*, but declined to decide whether the speech was protected under the *Pickering* balancing test, because it erroneously believed that the jury had been given the task of *Pickering* balancing and erroneously believed that it ought not consider whether a rationale not expressly relied on by the District Court

might nonetheless justify its award of judgment n.o.v. to respondents.[6] *See id.* at 1498-99 & n. 7.

On rehearing en banc, the Tenth Circuit Court of Appeals, by a 6-2 vote, held that petitioner's "speech" was unprotected because it did not involve a matter of public concern within the meaning of *Connick*. *See* 847 F.2d 1436, 1443-49 (10th Cir. 1988). The en banc majority also held that petitioner's "speech" was unprotected under *Pickering* because the report in question reflected upon petitioner's competence and ability to perform his job and caused evident disruption of necessary working relationships between petitioner and others, and thus the City's interest in efficiently providing necessary services outweighed petitioner's limited interest in making his "speech." *Id.* at 1449-52.

REASONS WHY THE WRIT SHOULD BE DENIED

The Court of Appeals' Opinions, the Petition for Certiorari, and this Brief in Opposition discuss several

6. The panel majority's notion that it could not consider an alternative rationale not explicitly addressed below was, of course, at odds with the rule of *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924), which permits an appellee, "without taking a cross appeal, [to] urge in support of a decree any matter appearing in the record, although his argument may involve an attack upon the reasoning of the lower court or an insistence upon matter overlooked or ignored by it." This "inveterate and certain" rule has been invoked by this Court on innumerable occasions. *See, e.g., Mass. Mut. Life Ins. Co. v. Ludwig*, 426 U.S. 479, 480 (1976) (per curiam).

more or less complex legal issues. The fundamental principle that underlies the Tenth Circuit Court of Appeals' en banc decision, however, was distilled into a single sentence in Judge Monroe McKay's concurring statement:

> The key in the difficult task of applying the general principles to the facts of this case lies in the fact that official reports cannot be immunized from competency judgments just because they involve subjects which are inherently dramatic and likely to attract public attention.

847 F.2d at 1453 (McKay, J., concurring). This is not a novel idea; nor is it in any way inconsistent with the First Amendment case law decided by this Court or in the other Circuits. Five years earlier, the en banc Seventh Circuit stated, in words that might have been designed for the instant case:

> [A] multitude of personnel decisions are of course properly based on what an employee says and how he says it. From the interview with an applicant for a position to discussions with the employee about the proper discharge of his duties, the content of an employee's speech naturally affects his superior's assessment of him and forms the basis of personnel decisions. In some sense even these kinds of communications–based on the substantive work to be performed–are matters of public interest, but making employment decisions based on such speech is plainly permissible. The state is simply acting in its capacity as an employer.

Egger v. Phillips, 710 F.2d 292, 316 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 918 (1983). There is nothing unusual, remarkable, or aberrant about this intuitively obvious principle, which has been recognized in the decision that petitioner attacks, in *Egger*, in *Schmidt v. Fremont County*

School District No. 25, 558 F.2d 982 (10th Cir. 1977), and in many other cases.

Review on writ of certiorari is necessarily confined to those few cases where "special and important reasons" justify this court's intervention. Sup. Ct. R. 17. No useful purpose would be served by this Court's affirmance of the obvious point that the First Amendment does not immunize government employees against scrutiny of their job performance just because part of that performance, as in the written report in this case, may be expressed in "speech." Moreover, judged both by numbers of pages expended in the petition and in the petition's order of "Questions Presented," petitioner's major argument is not that the en banc Court of Appeals' legal analysis was faulty, but that it misread the factual record. Respondents will show *infra* that the Court of Appeals misread neither the facts nor the law. But the pride of place that petitioner gives to his assertions of factual errors, which are of necessity unique to his particular case, speaks volumes about the general significance of his legal arguments–arguments he himself regards as merely subsidiary.

I. Petitioner's Intragovernmental Report is Not Protected Speech Under the Balancing Test of Pickering v. Board of Education, 391 U.S. 563 (1968)

A. Respondents Have Not Waived the Pickering Issue

Petitioner argues that respondents waived any right to claim that petitioner's "speech" was unprotected under the balancing test of *Pickering v. Board of Education*, 391 U.S. 563 (1968), by failing to invoke *Pickering* before

the jury returned its verdict and by failing to concede at trial that petitioner was demoted because of his "speech." These waiver arguments are frivolous.

In the first place, petitioner's waiver arguments are raised for the first time in his Petition for Certiorari; he has thus waived his own waiver arguments. More important, however, neither argument has merit. Respondents explicitly raised and discussed the question of whether petitioner's written report was protected "speech" under *Pickering* in their District Court Trial Brief, and again raised the question of whether petitioner's report constituted protected speech in their two motions for directed verdict. Similarly, under Fed. R. Civ. P. 8(e)(2), parties are explicitly permitted to raise alternative or inconsistent defenses at trial. Petitioner's claim that respondents had to concede that petitioner's "speech" caused his demotion in order to claim that the "speech" was unprotected under *Pickering* is the logical equivalent of claiming that a defendant must concede liability in order to contest the amount of damages. It is scarcely surprising that petitioner cites not a line of authority to support his waiver arguments.

B. The Factual Record and Jury Verdict Justify the Court of Appeals' Conclusion that Petitioner's Written Report Disrupted Ongoing Working Relationships and Reflected Upon his Competency and Ability to Perform his Job

Petitioner's primary substantive challenge to the Court of Appeals' conclusion that his "speech" was unprotected under the *Pickering* balancing test is based on his argument that the facts from which the Court of

Appeals drew its conclusion were inconsistent with the facts found by the jury. Petitioner does not argue that the Court of Appeals erred by following this Court's holding that whether the First Amendment protects government employees against adverse action based on their speech presents a question of law and requires an appellate court to make an independent examination of the whole record, *see, e.g., Rankin v. McPherson*, ___ U.S. ___, 107 S.Ct. 2891, 2897 n. 9 (1987); *Connick*, 461 U.S. at 150 & n. 10. Petitioner argues, rather, that the jury's verdict in favor of petitioner and against the City means that the jury found the County Attorney's accusations against petitioner to be groundless and in bad faith and found the assertions of Fire Chief Jones and City Manager Pyle that they demoted petitioner because of the disruptive effects of his "speech" to be similarly pretextual. He further argues that the Court of Appeals' legal conclusions must be overturned as inconsistent with these putative jury determinations of historical fact.

The factual findings that the jury's verdict can reasonably be understood to encompass, however, do not support the factual picture that petitioner would paint. By instructing the jury that petitioner's "speech" was protected as a matter of law, and that whether his conclusion of arson was true or false was not an issue in the case, the District Court took most of the factual issues away from the jury. With respect to the City's liability, the jury had only to determine that petitioner's report was a substantial factor in his demotion and that he would not have been demoted for some reason unrelated to his report. Those findings were virtually compelled by the evidence: it could scarcely be found that petitioner's

report was not a substantial factor in his demotion in the face of respondents' claims that petitioner was demoted because his report disrupted harmonious working relationships and reflected poorly on petitioner's competence. With respect to the County Attorney's motives, the jury was asked to determine nothing: neither the County Attorney nor the governmental unit for which he worked were defendants in the case. The jury *was* asked to assess the Fire Chief's and City Manager's decision to demote petitioner, but its answer to that question flatly rejected petitioner's contention that the ostensible basis for the demotion was phony: the people who decided to demote petitioner were found to have acted reasonably and in subjective good faith. Petitioner's assertion that "[t]he facts recited by the [en banc Court of Appeals] are the opposite of what the jury found," Petition for Certiorari, p. 30, is simply false.

C. The Court of Appeals Gave Appropriate Weight to the Fact that Petitioner's "Speech" Was Made In An Official Report That It Was His Job to Make

Petitioner makes two attacks upon the legal reasoning (as opposed to factual analysis) that the Court of Appeals used in striking the *Pickering* balance. His first attack is based on assertions that the Court of Appeals adopted a *per se* rule under which no official reports are protected under *Pickering*, or weighed the fact that his "speech" was contained in an official report too heavily against him. As to the supposed *per se* rule, this Court should take at face value the Court of Appeals' explicit declaration that it was *not* adopting such a rule. *See* 847 F.2d at 1441-43.

Nor did the Court of Appeals give the fact that petitioner's speech was made as part of his job *de facto* conclusive effect by ignoring the other factors that have been deemed relevant to the balancing process in *Pickering* and its progeny.[7] The court noted, in particular, the report's detrimental impact on working relationships between petitioner and other people with whom he had to deal as part of his job (the Police Department and other law enforcement agencies and, most notably, the County Attorney), the heightened importance of harmony in the law enforcement context, the fact that petitioner's job was not purely ministerial, but involved the exercise of considerable discretion and professional expertise, and the fact that the report could reasonably be deemed to reflect on petitioner's competence as Fire Marshal. 847 F.2d at 1451-52.

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7. The factors relied on by the Court of Appeals are all well supported in First Amendment case law. The government's interest in promoting harmonious working relationships has been recognized in numberless cases, *see, e.g., Pickering*, 391 U.S. at 570; *Connick*, 461 U.S. at 151-52; *Rankin v. McPherson*, ___ U.S. at ___, 107 S.Ct. at 2899, as has the heightened interest in regulating employee conduct in law enforcement or other agencies organized along paramilitary lines, *see, e.g., Germann v. Kansas City*, 776 F.2d 761, 764 (8th Cir. 1985), *cert. denied*, 479 U.S. 813 (1986); *cf., e.g., Kelley v. Johnson*, 425 U.S. 238 (1976), the heightened interest in regulating the conduct of employees who have discretionary or professional duties, as opposed to merely ministerial ones, *see, e.g., Rankin*, ___ U.S. at ___, 107 S.Ct. at 2900, and the heightened interest in regulating speech that reflects poorly on the speaker's fitness for his job, *see, e.g., Pickering*, 391 U.S. at 573 n.5; *Rankin*, ___ U.S. at ___, 107 S.Ct. at 2899.

To be sure, the fact that petitioner's speech was contained in an official report that petitioner made in the ordinary course of his job was given considerable weight by the Court of Appeals in striking the *Pickering* balance against him. That approach does not represent some unprecedented judicial usurpation of power, as petitioner would have it, but just reflects ordinary common sense, already recognized in cases such as *Egger v. Phillips*, 710 F.2d 292 (7th Cir.) (en banc), *cert. denied*, 464 U.S. 918 (1983). It is obvious that a government employer's interest in regulating "speech" that is part of an employee's job is heightened: an employer can scarcely evaluate the job performance of an employee whose job is to speak without evaluating the "speech." Would this Court suggest that the First Amendment forbade an individual Justice to fire or discipline one of his or her law clerks based on the "speech" contained in a memorandum that failed to cite relevant authorities known to the law clerk and contradicting the memorandum's conclusion? Hardly. Yet that is the precise analogue of what petitioner would have this Court hold: he is asking this Court to rule that the First Amendment forbade his superiors from acting on a report that reflected negatively on important aspects of his performance as a Fire Marshal.

D. In its *Pickering* Analysis the Court of Appeals Properly Weighed the Actual Disruptive Effect of Petitioner's Report, Rather Than the Hypothetical "Inherent" Disruptive Effect of Such a Report

Petitioner's second attack upon the Court of Appeals' *Pickering* analysis is based on the bizarre notion, ostensibly gleaned from *Pickering* itself, that what counts for First Amendment balancing purposes is not the actual

disruptive effect of a given speech, but the abstract "inherent" disruptive effect of the speech. In general, says petitioner, reports which conclude that fires are caused by arson don't enrage County Attorneys; he thus suggests that the Court of Appeals should have analyzed the case as if County Attorney O'Sullivan had greeted petitioner's report with equanimity.

Petitioner's argument misses the point of the passages from *Pickering*, 391 U.S. at 570-71, on which it is supposedly based. The point that Justice Marshall was making in *Pickering*, by analogy to the common law of libel, was that a school teacher could not be fired for erroneous public criticisms of certain school board policies when there was no evidence that the criticisms either actually harmed the schools in some way or were of such a nature as to be deemed harmful per se, just as, under the common law of libel, a plaintiff could not recover damages for a defendant's false statements about him unless he established either actual harm to his reputation or false statements that by their nature could be presumed to harm his reputation ("libel per se"). Justice Marshall was not saying, as petitioner now interprets him, that the only harmful statements that matter are those that are, in petitioner's words, "inherently" harmful, any more than, under the common law of libel, only libel per se was actionable.

Nor does petitioner's argument make any sense as a matter of policy. The issue at bar is not whether the non-party County Attorney infringed petitioner's First Amendment freedoms, but whether the City, through its Fire Chief and City Manager, did. In making their judgment as how best to promote the public's interest in the

efficient identification and prosecution of arsonists, Fire Chief Jones and City Manager Pyle were not dealing with the platonic ideals of a County Attorney and a Fire Marshal: they were dealing with the flesh and blood County Attorney and Fire Marshal. The public interest did not permit them the luxury of pretending that there was no problem between petitioner and the County Attorney, while watching the pursuit of arsonists grind to a halt until one of the antagonists cried uncle. The public interest, rather, demanded that they act. They solved their problem, reasonably and in good faith, so the jury held, by demoting petitioner into a position that did not involve contact with the County Attorney. They had to act in the real world; their conduct should be judged accordingly.

II. The Court of Appeals Did Not Err in Concluding that Petitioner's Intragovernmental Report Was Not Speech on a Matter of Public Concern Within the Meaning of *Connick v. Myers*, 461 U.S. 138 (1983)

A. The Issue of Whether Petitioner's Report Was Speech on a Matter of Public Concern Under *Connick* is Moot Because the Court of Appeals Held that Petitioner's Report Was Not Protected Under the Pickering Balancing Test

Respondents will demonstrate *infra* that the Court of Appeals correctly determined that petitioner's report on the cause of the fire did not constitute speech on a matter of public concern within the meaning of *Connick v. Myers*, 461 U.S. 138 (1983). Yet even if the Court of Appeals' decision on the *Connick* issue were wrong (as it is not), that hypothetical error would itself merit no correction,

because it would not affect the Court of Appeals' affirmance of the District Court's judgment in favor of respondents. That is because the conclusion that any given example of government employee "speech" is on a matter of public concern does not imply that the "speech" is protected under the First Amendment in the sense that adverse employer decisions may not be based on the "speech."

To qualify as protected speech, rather, speech deemed to be on a matter of public concern must still pass the *Pickering* balancing test. *See, e.g., Rankin,* ___ U.S. at ___, 107 S.Ct. at 2898-99; *Connick,* 461 U.S. at 150-51. Because the Court of Appeals explicitly determined that petitioner's report failed the *Pickering* balancing test, and was therefore not protected "speech," its resolution of the threshold public concern test is moot.

B. Petitioner's Report Was Unprotected Under *Connick* Because it Was Not on a Matter of Public Concern

In *Connick,* this Court recognized that the reaction of government employers to employee expression not on issues of public concern should not be subjected to scrutiny in the name of the First Amendment, but that "government officials should enjoy wide latitude in managing their offices, without intrusive oversight by the judiciary." 461 U.S. at 146. To illustrate the "public concern" threshold test it was adopting, this Court posed a dichotomy, keyed to the facts of the case before it:

> "When a public employee speaks not as a citizen upon matters of public concern, but instead as an employee upon matters of personal interest, absent the most unusual circumstances, a federal court is

> not the appropriate forum in which to review the wisdom of a personnel decision taken by a public agency allegedly in reaction to the employee's behavior."

Id. at 147.

This threshold test, which removes many employer-employee disputes from First Amendment purview, was premised on several informing rationales. Foremost among these was the recognition that the line of cases which effectuated the demise of Justice Holmes's famous dictum that a policeman "may have a constitutional right to talk politics, but he has no constitutional right to be a policeman," *McAuliffe v. Mayor of New Bedford*, 155 Mass. 216, 220, 29 N.E. 517, 517 (1892), and which culminated in *Pickering, all* involved this court's rejection of government "attempts to suppress the rights of public employees to participate in public affairs," and reflected "the Constitution's special concern with threats to the right of citizens to participate in political affairs." 461 U.S. at 144-45. *Connick's* secondary rationale was the recognition that the purpose of public employee First Amendment law should be to "ensure that citizens are not deprived of fundamental rights by virtue of working for the government" and not to provide public employees with a "grant of immunity for employee grievances not afforded by the First Amendment to those who do not work for the State." *Id.* at 147.

In light of *Connick's* informing rationales, it is not surprising that in literally every one of this Court's post-*Pickering* public employee cases where the "speech" involved was deemed of public concern, it related to "political" matters in the broad sense that encompasses

the evaluation, commentary, critique, or proposed change of governmental or similar social institutions. *See Perry v. Sindermann*, 408 U.S. 593 (1972) (testimony before legislative committee in favor of elevating junior college to four year status); *Mt. Healthy City Board of Education v. Doyle*, 429 U.S. 274 (1977) (public criticism of teacher dress code supposedly promulgated to enhance public support for bond issues); *Givhan v. Western Line Consolidated School District*, 439 U.S. 410 (1979) (private criticism of racially discriminatory school policies); *Connick* (implicit criticism of pressure to work on political campaigns); *Rankin* (criticism of Reagan administration cutbacks in social welfare programs).

Similarly, the Circuit Courts of Appeals have universally interpreted the *Connick* threshold as requiring that employee speech, to qualify for potential protection as involving "public concern," must relate to an evaluation, commentary, critique, or proposed change in government performance or policies. *See, e.g., Daniels v. Quinn*, 801 F.2d 687, 690 (4th Cir. 1986)("matters of public concern for [*Connick*] purposes must relate to wrongdoing or a breach of trust, not ordinary matters of agency policy."); *Callaway v. Hafeman*, 832 F.2d 414, 416 (7th Cir. 1987)(speech not having social or political change as its goal "will be afforded less protection generally, and specifically when viewed in the context of public employment cases"); *McKinley v. City of Eloy*, 705 F.2d 1110, 1114 (9th Cir. 1983)(speech not of public concern if it "would be of no relevance to the public's evaluation of the performance of governmental agencies").

Under the prevailing interpretations of the *Connick* public concern test, then, petitioner's purely internal

report, prepared for the eyes of the County Attorney, which criticized no one, exposed no governmental wrongdoing, and was useless as an index of government performance, does not qualify for First Amendment protection. Plaintiff was not a whistleblower when he wrote his report. He may have become one after his demotion, when he sought his revenge against the people who had caused that demotion, but his post-demotion comments were never at issue in the District Court. The *only* "speech" that petitioner claimed was protected by the First Amendment and the *only* speech that the District Court's instructions permitted the jury to consider was petitioner's official report.

Petitioner, however, espouses a different, highly formalistic interpretation of *Connick*. Unmooring Justice White's language from its policy and factual underpinnings, and focussing on one term from each side of the *Connick* dichotomy ("public concern" and "personal interest"), he suggests that employee speech gets past the *Connick* hurdle merely if it is of general public interest, and not just of parochial concern. Under this "public interest" test the press becomes the ultimate arbiter of a statement's *Connick* status, and the archetypal speaker on matters of public concern is no longer the whistleblower or political reformer, but the gossip columnist.

Of course, petitioner's notion that newsworthiness is the ultimate test of what is and isn't protected by the First Amendment has been flatly rejected by the courts, *see, e.g., Egger*, 710 F.2d at 317, perhaps because, as one noted First Amendment commentator has put it, "a classification that bases the right to First Amendment protection on some estimate of how much general interest there is in the communication is surely in conflict with the

whole idea of the First Amendment." T. Emerson, *The System of Freedom of Expression* 554 (1970). This Court should not waste a precious opportunity for review on a moot interpretation of *Connick*, especially when the alternative interpretation urged by petitioner represents the antithesis of prevailing First Amendment jurisprudence.

CONCLUSION

The decision of the en banc Court of Appeals for the Tenth Circuit that petitioner wishes to reverse is correct, utterly mainstream, highly fact bound, and remarkable only because of the bizarre analyses of the panel majority and en banc dissent. It is a wholly unworthy candidate for this Court's discretionary review by writ of certiorari: The Court should pass on to the more significant cases on its docket.

Respectfully Submitted,

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